**UNREPORTED**

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO.62 OF 2004**

**IN**

**REVIEW PETITION (LOD) NO.6 OF 2004**

**IN**

**WRIT PETITION NO.71 OF 1993**

1. Bussa Overseas and Properties Pvt. Ltd., a private limited Company incorporated under the provisions of the Companies Act, 1956 and having its Registered Office at 801, Napean Sea road, Bombay - 400 006.

2. Mr. Bharat Bussa, Residing at 801, Napean Sea Road, Bombay-400 006. ..Petitioners.

V/s.

1. Union of India.

2. Assistant Collector of Customs, Group I, having his office at New Custom House, Ballard Estate, Bombay 400 038. ..Respondents.

Mr.R.A.Dada senior Advocate with M.P.S.Rao, Karl Shroff, Firdosh Karachiwala and Bidan Chandran i/b. M/s.Firdosh & Co. for petitioners.

Mr.R,V, Desai, senior Advocate with A.S. Rao for the respondents.

**CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.**

**DATED : 14TH SEPTEMBER, 2004.**

**JUDGMENT (PER J.P. DEVADHAR, J.)**

1. Heard counsel on both sides.

2. This Notice of Motion is taken out by the petitioners seeking condonation of delay of 129 days in filing the review petition. By the review petition the petitioners seek review of the Judgement and order dated 15th September, 2003 passed in Writ Petition No.71 of 1993.

3. By the said Judgment dated 15th September, 2003 we had rejected the refund claim of the petitioners for Rs.39,74,412/- inter alia on the ground that the petitioners have admittedly recovered the said amount from their customers and if the refund is again granted by the Court, it would result in unjust enrichment to the petitioners. It is not in dispute that the Special Leave Petition filed by the petitioners against the said decision has been dismissed by the Apex Court on 28th November, 2003.

This Review Petition with a Notice of Motion seeking condonation of delay is filed after the dismissal of the Special Leave Petition.

4. Mr.Desai, learned senior advocate appearing on behalf of the respondents relying upon the decision of the Apex Court in the case of **Abbai Maligai Partnership Firm V/s. K.Santhakumaran** reported in **A.I.R. 1999 S.C. 1486** raised a preliminary objection that this Court has no power to review its own order which has been subject matter of the challenge in the Special Leave Petition. On the other hand, Mr.Dada, learned senior advocate relied upon the later decision of the Apex Court in the case of **Kunhayammed and others V/s. State of Kerala and another** reported in **(2000) 6 Supreme Court Cases 359** and submitted that since the Special Leave Petition is dismissed by a non speaking order the petitioners are entitled to seek review of the order passed by the High Court.

5. The grounds for seeking condonation of delay set out in the affidavit in support of the Notice of Motion are twofold. Firstly, it is stated that pursuant to the application made on 15th September, 2003 the petitioners have received two different certified copies of the Judgment, one on

23/9/2003 (against which the Special Leave Petition was filed) and the another on 19/1/2004. According to the petitioners, if the first certified copy of the Judgment received on 23/9/2003 is taken into account for the purpose of limitation, then, there is delay of 129 days and if the second certified copy received on 19/1/2004 is taken into account, then, there is no delay in filing the review petition. Secondly, it is stated that considerable time was taken in drafting and settling the review petition and, therefore, the delay should be condoned.

6. With reference to the first contention raised by the petitioners, we directed the registry to submit a report as to how two different Judgment copies were issued in the matter. Thereupon, the registry reported that on 15th September, 2003 advocate for petitioners had made two applications, one for certified copy of the Judgment dated 15th September, 2003 and another for the minutes of the order dated 15th September, 2003 which is required to be drawn and maintained as per rule of the Original Side Rules of this Court and it is the practice followed since inception by this Court. Accordingly, on 23rd September, 2003 a certified copy of the Judgment was issued to the petitioners and on

19/1/2004 a certified copy of minutes of the order dated 15th September, 2004 was issued to the petitioners. The minutes of the order contained only the relevant extracts from the Judgment and the final order passed thereon and not the entire Judgment itself as per rules stated hereinabove. In other words, what was issued on 19/1/2004 was not a certified copy of the Judgment but was only a minutes of the order. In these circumstances, it was clear that the statements made in the affidavit in support of the Notice of Motion to the effect that the registry had issued two different certified copies of the Judgment was totally incorrect and misleading to the knowledge of the advocates and solicitors on record.

7. When the above facts were brought to the notice of the petitioners, Mr.Bharat Busa, Director of the petitioner No.1 filed an additional affidavit duly affirmed on 27th August, 2004 stating therein that the averments made in the affidavit in support of the Notice of Motion were on a mistaken belief that the copy of minutes of the order received on 19/1/2004 was in fact a certified copy of the Judgment and not the minutes of the order. He tendered unconditional apology for making a wrong and misleading statement in

the affidavit in support of the Notice of Motion. Thus, the first ground set out by the petitioners for condoning delay does not survive in view of the additional affidavit filed by the petitioners. Even otherwise, no discretionary powers in favour of the review petitioners can be exercised for making misleading statement knowing fully well the difference between minutes of order and the Judgment.

8. As regards the second ground urged by the petitioners, it must be stated that by no stretch of imagination, mere delay in drafting and settling the review petition can be a ground for condoning the delay. Admittedly, against the decision of this Court the petitioners had filed Special Leave Petition and most of the contentions now sought to be raised in Review Petition were raised in the Special Leave Petition. After the dismissal of the Special Leave Petition, it is not open to the petitioners to contend that considerable time was taken in drafting and settling the Review Petition. In any event, in the facts of the present case, no prejudice of any nature whatsoever would be caused to the petitioners if the delay is not condoned because the petitioners have admittedly recovered the entire refund claim from their customers. Therefore, assuming that the review

petition is maintainable even after the dismissal of the Special Leave Petition, in the facts of the present case, the delay of 129 days does not deserve to be condoned.

9. In order to show prima facie case for condonation of delay Mr.R.A. Dada, learned senior Advocate appearing on behalf of the petitioners relied upon the decision of the Apex Court in the case of **Commissioner of Central Excise, Mumbai-II V/s. Allied Photographics India Ltd.** reported in **2004 (4) S.C.C. 34** and submitted that the petitioners have a prima facie good case on merits and, therefore, delay should be condoned. He submitted that as held by the Apex Court in the above case, there is a distinction between a provision for making refund and a provision for claiming of refund and this vital distinction has not been taken into consideration in the impugned Judgment and, therefore, the said Judgment must be recalled and decided in the light of the above decision of the Apex Court. Mr.Dada submitted that section 27 and section 18 of the Customs Act, 1962 operate in different fields and these two sections cannot be read together. He submitted that section 18 of the Customs Act being a complete Code in itself, the refund arising on finalisation of the provisional assessment cannot be said to be governed by the

provisions of Section 27 of the Customs Act, 1962.

10. Mr.Dada further submitted that the findings given in para 31 of the Judgment to the effect that at the relevant time the provisions relating to refund arising on finalisation of provisional assessment under the Excise Act and Customs Act were different is erroneous. He submitted that the newly substituted section 27 of the Customs Act introduced in the year 1991 did not contain the Explanation dealing with the refund arising on finalisation of provisional assessment and the said provision was introduced in the year 1998 by way of Explanation II to section 27 of the Customs Act. Therefore, the assumption drawn in the Judgment that at the relevant time the provision relating to the refund arising on finalisation of provisional assessment was covered under section 27 of the Customs Act is erroneous. Accordingly, the learned counsel submitted that the impugned Judgment dated 15th September, 2003 suffers from error apparent on the face of record and if the said Judgment is not recalled and decided afresh in the light of the decision of the Apex Court referred to hereinabove, grave injustice would be caused to the petitioners.

11. Mr.R.V.Desai, learned senior Advocate appearing on behalf of the respondents submitted that once the Special Leave Petition filed against the decision of this Court is dismissed by the Apex Court, it is not open to the petitioners to seek review of the Judgment passed by this Court. He submitted that in any event the petitioners have not made out any prima facie case for condonation of delay and accordingly both the Notice of Motion and the Review Petition are liable to be dismissed.

12. As stated hereinabove, all the grounds set out in the affidavit in support of Notice of Motion seeking condonation of delay are devoid of any merit. Hence dealing with the merits of the Review Petition is not warranted. However, we may briefly deal with the arguments advanced by the petitioners only to show that no prima facie case on merits is made out as such and no injustice will be caused to the petitioners by declining to condone the delay and consequently not entertaining the Review Petition.

13. The contention of the petitioners that in the light of the decision of the Apex Court in the case of Allied Photographics India Ltd. (supra) the impugned Judgment dated 15/9/2003 must be recalled is

without any merit. The said decision was rendered by the Apex Court in the context of the provisions of the Central Excise Act and as stated in our Judgment dated 15/9/2003, there was material distinction between the provisions of the Central Excise Act and the Customs Act in the matter of refund of duty. Therefore, the distinction between a provision for making refund and a provision for claiming refund pointed out by the Apex Court in the above case while dealing with the provisions of the Central Excise Act will not be applicable to the provisions contained in the Customs Act. In the present case, on considering the provisions of the Customs Act, we had held that section 27 applies to refund of duty paid pursuant to an order of assessment. It was also held that section 2(2) of the Customs Act defines 'assessment' to include provisional assessment. Accordingly, it was held that the refund of duty on finalisation of provisional assessment would be squarely covered under section 27 of the Customs Act. In these circumstances, it is not open to the petitioners to challenge the said findings by relying upon the provisions under the Central Excise Act.

14. However, in fairness to the counsel for the petitioners, it must be stated that the findings given

in para 31 of the impugned Judgment to the effect that during 1991 to 1998 section 27 of the Customs Act contained an Explanation regarding the refund arising on finalisation of provisional assessment is not correct. As rightly pointed out by the learned counsel for the petitioners, while substituting section 27 by a new section in the year 1991 the said Explanation (existing prior to 1991 amendment) was not incorporated and the same was specifically incorporated by way of Explanation II in the year 1998. Thus, during the period 1991 to 1998 no such Explanation existed in section 27 of the Customs Act and finding to the contrary recorded in para 31 of the Judgment must be held to be erroneous.

15. The said erroneous finding given in para 31 of the Judgment, however, does not affect the ultimate decision rendered in the matter, because of the other findings given in the said Judgment.

16. For the sake of convenience, the findings given in our Judgment dated 15/9/2003 for not entertaining the Writ Petition may be broadly summarised as follows : -

a) admittedly the petitioners have

recovered from their customers the amount claimed in the Writ Petition and, therefore, grant of refund would result in unjust enrichment to the petitioners.

b) Section 18 & 27 of the Customs Act are not independent and have to be read together because;

i) Section 27 of the Customs Act deals with the refund due to the assessee pursuant to an order of assessment. Section 2(2) of the Customs Act defines the word 'assessment' to include 'provisional assessment' and, therefore, refund arising on finalisation of provisional assessment under section 18 would be governed by the provisions of section 27 of the Customs Act.

ii) Section 18 (2) of the Customs Act merely entitles the assessee to get refund in case the duty finally assessed is less than the

duty paid provisionally and to obtain such refund arising on finalisation of the provisional assessment, the assessee has to follow the procedure prescribed under section 27 of the Customs Act.

iii) In para 31 of the Judgment, it was held that as per Explanation to section 27 of the Customs Act specifically includes refund arising on finalisation of provisional assessment.

(c) The decision of the Apex Court in the case of **Mafatlal Industries Ltd. V/s. Union of India [89 E.L.T.247 (S.C.)]** to the effect that the refunds arising on finalisation of provisional assessment under Rule 9B are not governed by section 11A or section 11B of the Excise Act is not applicable to the cases under the Customs Act.

(d) In any event, even though the petitioners have a right to refund, it is not a fit case to exercise writ jurisdiction under Article 226 as the petitioners have already recovered the amount from the customers.

17. Thus, even though the finding given in para 31 of the Judgment is found to be incorrect, it neither changes the colour of our Judgment nor affect the final decision rendered in the matter.

18. For all the aforesaid reasons, we see no reason to grant prayer for condonation of delay to review our Judgment and order dated 15/9/2003.

19. Accordingly, the Notice of Motion seeking condonation of delay is dismissed. Consequently, the Review Petition is consigned to record.

21. In the facts and circumstances of the case, there will be no order as to costs.

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